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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, JUNE 15, 2000

PETITION OF

CAVALIER TELEPHONE, LLC

CASE NO. PUC990191

For arbitration of interconnection
rates, terms and conditions, and
related relief

ORDER

On October 18, 1999, Cavalier Telephone, LLC ("Cavalier"), filed a pleading that contained both an informal complaint against Bell Atlantic-Virginia, Inc. ("BA-VA"), and a request that the Commission arbitrate the rates, terms, and conditions for interconnection and related arrangements concerning a proposed amendment to the parties' interconnection agreement, which we had approved by Order entered June 21, 1999, in Case No. PUC980048. Cavalier petitioned to convert the informal complaint to formal status on January 5, 2000. Pursuant to our Order Initiating Formal Proceeding in the above-captioned case, issued February 11, 2000, we referred portions of this matter to the Hearing Examiner and ordered the parties to brief certain jurisdictional issue questions, including:

1. Is the jurisdiction over this complaint properly before this Commission, the FCC, or a state or federal court of general jurisdiction?
2. If jurisdiction over the complaint properly lies with this Commission, what remedies are available to us?

3. Is there a basis in Virginia law for the Commission to assert or exercise jurisdiction over the request for the Commission to arbitrate unresolved issues between the parties that is independent of any authority contained in the Act?

4. Should the Commission establish a generic case to establish BA-VA's prices for DSL loops as an unbundled network element and is there a basis to do so under state law?

We directed the Hearing Examiner to review the pleadings and briefs and report his recommendations. The Commission also withheld action on Cavalier's concurrently filed request for arbitration and BA-VA's motion to dismiss that request. Hearing Examiner Howard P. Anderson, Jr. filed his Report on April 14, 2000. Cavalier and BA-VA filed comments to the Report on May 5, 2000. The Examiner found:

1. The Commission has jurisdiction to hear Cavalier's complaint.

2. The remedies available to the Commission in this matter include the powers of injunction and mandamus, but not the authority to award damages.

3. Virginia law provides a basis, separate and apart from authority contained in the federal Telecommunications Act of 1996, 47 U.S.C. 151, et seq. (the "Act"), for the Commission to assert or exercise jurisdiction over Cavalier's petition for arbitration of interconnection terms and conditions.

4. The Commission should establish a generic investigative docket to establish prices for BA-VA's provision of digital subscriber line loops ("DSL") as an unbundled network element to competitive local exchange carriers.

NOW THE COMMISSION, upon consideration of the Report, the comments thereon, and the record herein, concludes as discussed more fully below that we should adopt the first three of the Examiner's findings and recommendations. We find no need to establish a generic pricing docket for DSL loops. Under the procedures we will set out in this Order, we will establish the prices for this network element pursuant to the authority conveyed to us under the Constitution of Virginia and Code of Virginia and such authority conveyed by the Act that we may lawfully exercise.

Alternatively, Cavalier may elect to withdraw its request for our arbitration of these matters and instead petition the Federal Communications Commission ("FCC") to undertake to establish such prices solely under the authority of the Act. Any prices we establish for DSL loops will be available to any CLEC wishing to obtain this element from BA-VA. Finally, Cavalier may continue to prosecute its complaint here or avail itself of the concurrent jurisdiction of the courts of general jurisdiction in the Commonwealth with regard to the issues raised in that portion of its pleading.

Consistent with these findings, we will now deny BA-VA's Motion to Dismiss and Motion for More Definite Statement. We direct Cavalier to advise us in writing, within 15 days of the date of this Order, whether it will continue either of these matters before us.

We have concluded that there is substantial doubt whether we can take action in this matter solely pursuant to the Act, given

that we have been advised by the United States District Court for the Eastern District of Virginia that our participation in the federal regulatory scheme constructed by the Act, with regard to the arbitration of interconnection agreements, effects a waiver of the sovereign immunity of the Commonwealth. It is axiomatic that the Commission has no inherent power simply because it was created by the Constitution of Virginia. Its jurisdiction must be found either in constitutional grants or in statutes that do not contravene the Constitution.¹ No statute or constitutional grant authorizes us to subject the Commonwealth to federal suit by waiving its sovereign immunity.

We have examined the Virginia Code and our previously promulgated rules, however, and find that they provide sufficient authority necessary for us to render a decision on the pending request for arbitration.

Jurisdiction to Hear Complaint

As found by the Examiner, we conclude that Virginia law provides ample authority for the Commission to exercise jurisdiction over Cavalier's complaint. We further find that our authority, in this matter, is concurrent with that of the courts of common jurisdiction within the Commonwealth. Article IX of the Constitution of Virginia establishes our general authority over the rates and services of public service companies. Section 56-35 of the Code of Virginia grants us the power, and charges us with the duty, of "supervising, regulating and

¹ City of Norfolk v. Virginia Electric and Power Company, 197 Va. 505; 90 S.E.2d 140 (1955).

controlling all public service companies doing business in this Commonwealth, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies." Both Cavalier and BA-VA are public service companies and subject to our authority in these regards.

Section 56-6 of the Code provides that any person or corporation aggrieved by actions or omissions of a public service company of any of their obligations imposed by the Code "shall have the right to make complaint of the grievance and seek relief by petition against such public service corporation before the State Corporation Commission" Chapter 15 of Title 56 of the Code of Virginia extensively sets out our authority over telephone companies operating within the Commonwealth, including the right to require interconnection between carriers.

Section 56-6 provides that upon hearing a complaint the Commission "shall have jurisdiction, by injunction, to restrain such public service corporation from continuing [its breach of the law] and to enjoin obedience to the requirements of this law" Further, the Commission may "by mandamus, . . . compel any public service corporation to observe and perform any public duty imposed upon public service corporations by the laws of this Commonwealth" Other provisions of the Code permit the imposition of fines for specified violations. However, we find no jurisdiction to award damages that Cavalier seeks in its

complaint.² Therefore, should Cavalier decide to maintain its complaint action against BA-VA before us, the remedies available to it under the Code of Virginia are injunctive and prospective in nature. We have no authority to award damages to Cavalier should we find its complaint to be well-founded.

Jurisdiction over Arbitration Request

Turning to the matter of the request for arbitration, we also find authority under state law that provides for our intercession. Section 56-479 of the Code of Virginia empowers us to order interconnection between carriers operating within the Commonwealth, and § 56-38 authorizes us, upon request of the parties, "to effect, by mediation, the adjustment of claims, and the settlement of controversies, between public service companies, and their employees and patrons." In this instance, Cavalier would be a patron of BA-VA as Cavalier seeks to obtain services and use of BA-VA's facilities in order to provide DSL services to its own patrons.

In addition to the authority quoted above, the Commission promulgated regulations prior to the passage of the Act to implement the revisions to § 56-265.4:4 C 3 of the Code of Virginia that allowed us to certificate competing local exchange carriers. In Case No. PUC950018,³ we adopted rules, now codified at 20 VAC 5-400-180 as "Rules governing the offering of

² Section 207 of the Federal Communications Act of 1934 provides that damages may be recovered in complaint to the FCC. The Code of Virginia contains no analogous provisions allowing the Commission to award damages.

³ Ex Parte: In the matter of investigating local exchange telephone competition, including adopting rules pursuant to Virginia Code § 56-265.4:4.C.3, Case No. PUC950018, 1995 S.C.C. Ann. Rep. 249.

competitive local exchange telephone service," ("Rules") in anticipation that we would address issues such as this under the authority of the Virginia Code. Rules 20 VAC 5-400-180(F)(5) and (6) specifically provide for our "arbitration" of contested matters.

Shortly after the issuance of the Rules, the federal Act was passed and we promulgated additional rules to implement the procedures established by that measure. Following the Commission's arbitration of certain earlier interconnection agreements submitted under §§ 251 and 252 of the Act pursuant to these later-enacted rules, our orders approving these agreements were reviewed on federal appeal as explicitly provided by § 252(e)(6) of the Act⁴. What is not made explicit in the Act (nor do we consider legally inferred therefrom), however, is that the Commonwealth of Virginia, in the person of the Commissioners acting in their official capacity, would also be a party to this federal review. The Commission had maintained and continues to maintain that in taking its actions on these agreements the Commonwealth of Virginia is protected from federal suit by the Eleventh Amendment to the U.S. Constitution.

The Commission did not consider its participation in the Act's regulatory scheme to constitute a waiver of immunity under the Eleventh Amendment. The Commission has no authority to waive the Commonwealth's sovereign immunity. Therefore, we will not

⁴ See MCI Telecomm. Corp. v. Bell Atlantic-Virginia, Inc., 1997 WL 1133714 (E.D. Va.); GTE South Inc. v. Morrison, 957 F. Supp. 800 (1997); GTE South Inc. v. Morrison, 6 F. Supp.2d 517, *aff'd*, 199 F.3d 733 (4th Cir. 1999); AT&T of Virginia v. Bell Atlantic-Virginia, Inc., 197 F.3d 663 (4th Cir. 1999)

take any action in this matter that may subject the Commonwealth to federal suit. As noted above, we find clear and pertinent authority under Virginia law, and our Rules, to permit our resolution of the arbitration dispute, and any order we enter with regard to this portion of Cavalier's pleading will be taken accordingly. Thus, any party aggrieved by our action in resolving these issues would have an appeal of right to the Virginia Supreme Court. The extent to which our actions are or may be concurrently authorized by the Act should be viewed as coincidental in this respect. Any party that proceeds before us shall be deemed to be requesting our action under color of the authority we are unquestionably delegated to wield – that of the Commonwealth of Virginia, and all such other authority we may lawfully exercise without waiving the Commonwealth's immunity.

Until the issue of Eleventh Amendment immunity from federal appeal under the Act is resolved by the Courts of the United States,⁵ we have concluded no longer to act solely under the Act's federally conveyed authority in matters that might arguably implicate a waiver of the Commonwealth's immunity, including the

⁵ In at least one of the federal appellate circuits, the Fifth, the doctrine of waiver of sovereign immunity has apparently been extinguished. See, AT&T Communications Commission of South Central States v. BellSouth Telecommunications, Inc., 43 F. Supp.2d 593 (M.D. La. 1999). We have also recently joined a friend of the Court brief prepared by the Pennsylvania Public Utilities Commission urging the United States Supreme Court to grant certiorari in Strand et al. v. Michigan Bell Telephone Co., No. 99-1878, filed June 15, 2000, a decision of the 6th Circuit permitting suit against the Michigan public utility commissioners under a different legal theory. The 4th Circuit also appears poised to address the sovereign immunity issue in BellSouth Telecommunications, Inc. v. North Carolina Utilities Commission, No. 99-1845(L), which was argued May 1, 2000. The Court has requested supplemental briefs from the parties on the question whether the North Carolina Utilities Commission is an indispensable party to any federal review action pursuant to the Act.

arbitration of rates, terms, and conditions of interconnection agreements between local exchange carriers. We do find, though, that we possess authority under Virginia law for us to continue to resolve such issues.

Accordingly, IT IS ORDERED THAT:

(1) The Commission will, upon receipt of the notification required by Paragraph No. 4, infra, consider Cavalier's complaint pursuant to the Rules set out in 20 VAC 5-400-180, other pertinent state statutes and rules, and under such authority we can lawfully exercise pursuant to the Act.

(2) Pursuant to Rule 7:1 of our Rules of Practice and Procedure, the Commission hereby appoints a Hearing Examiner to conduct all further proceedings necessary to establish an interconnection agreement between the parties, consistent with the findings above.

(3) BA-VA's Motion To Dismiss and Motion For More Definite Statement are hereby denied.

(4) Cavalier shall, within fifteen (15) days of the date of this Order, advise us in writing whether it wishes to continue these matters before us, consistent with the findings above.

(5) This case is continued for further orders of the Commission.